

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

The Cheyenne River Sioux Tribe Telephone
Authority's and US West Communications, Inc.'s
Joint Petition for Expedited Ruling Preempting
South Dakota Law

CC Docket No. 98-6

COMMENTS OF STANDING ROCK SIOUX TRIBE

The Standing Rock Sioux Tribe¹ submits the following comments, in response to the Federal Communications Commission's ("FCC" or "Commission") Public Notice,² in support of the joint petition (the "Petition") of US West and the Cheyenne River Sioux Tribe Telephone Authority ("CRSTTA") seeking preemption by the FCC of certain laws of the State of South Dakota as applied to Indian tribes. Specifically, US West and CRSTTA seek preemption of S.D. Codified Laws § 49-31-59 requiring that all sales of local telephone exchanges be approved by the South Dakota Public Utilities Commission ("SDPUC"). Although arguably acceptable on its face, the law, as applied by the SDPUC to federally recognized Indian tribes, constitutes an impermissible barrier to entry pursuant to Section 253 of the Communications Act of 1934, as amended (the "Act").

¹ The Standing Rock Sioux Tribe is an unincorporated Tribe of Indians that has accepted the Indian Reorganization Act of June 18, 1934, with the exception of Article 16. The recognized governing body of the Tribe is known as the Standing Rock Sioux Tribal Council.

² See Commission Seeks Comment On Cheyenne River Sioux Tribe Telephone Authority's And U S West's Joint Petition For Preemption Pursuant To Section 253 CC Docket No. 98-6, DA 98-145 (1998).

Introduction

The genesis of this proceeding was a joint application filed with the SDPUC over three years ago on December 20, 1994, seeking approval of the sale of 67 local telephone exchanges by US West to twenty separate buyers, including the sale of three exchanges, the McIntosh, Timber Lake, and Morristown exchanges (the "Exchanges"), to CRSTTA. The SDPUC approved the sale of 63 of the 67 exchanges, denying the sales to CRSTTA and a municipal telephone company that sought to purchase the Alcester exchange.³ The basis for the SDPUC's denial of the sale is basically two-fold: (1) the SDPUC fears loss of tax revenues because it would not be able to collect a gross receipts tax from the CRSTTA; and (2) the SDPUC believes that it cannot approve the sale because it lack the regulatory authority to set certain conditions of sale that must be followed by CRSTTA, as well as its general lack of authority to regulate the operations of CRSTTA in the public interest.⁴ This decision effectively blocks the CRSTTA from expanding its telecommunications services beyond its current service area to other service areas within the Cheyenne River Sioux and Standing Rock Indian reservations.⁵

³ The SDPUC denied the Alcester sale because a municipal telephone company from Beresford sought to purchase the Alcester exchange, which was not within the Beresford municipal limits, and therefore would have violated state law requiring that municipal telephone companies operate telephone exchanges only within their respective municipalities.

⁴ See *Amended Decision and Order Regarding Sale of the McIntosh Exchange; Notice of Entry of Order*, Preliminary Statement, TC94-122 (Aug. 22, 1997); *Amended Decision and Order Regarding Sale of the Timber Lake Exchange; Notice of Entry of Order*, Preliminary Statement, TC94-122 at 8-9 (Aug. 22, 1997); *Amended Decision and Order Regarding Sale of the McIntosh Exchange; Notice of Entry of Order*, Preliminary Statement, TC94-122 at 8-9 (Aug. 22, 1997); *Amended Decision and Order Regarding Sale of the Morristown Exchange; Notice of Entry of Order*, Preliminary Statement, TC94-122 at 8-9 (Aug. 22, 1997)

⁵ CRSTTA currently provides, and has provided for the past 21 years, high-quality telecommunications services to two exchanges within the Cheyenne River Sioux Indian Reservation. Current services are offered using all digital switches and include all basic

(Footnote continues on following page.)

Through the Telecommunications Act of 1996, Congress sought to establish “a pro-competitive, deregulatory national policy framework” for the United States telecommunications industry.⁶ This goal of Congress recognizes the critical importance of freely available, high-quality, advanced telecommunications services to the general public, as well as the fact that, in most cases, the market will provide the most effective means for bringing such services to the public. Nowhere is the need for high-quality telecommunications services more pressing than in Indian Country.⁷

In many cases, tribal governments, like the Cheyenne River Sioux Tribal Council, have determined that the most effective way for them to ensure adequate telecommunications services for their members and those living within reservation boundaries is to assume the responsibility of providing local telephone services. Often, the only economically feasible way to take such action, however, is to purchase the existing telephone infrastructure for a given area and provide services as the local telephone company. Laws that prevent purchases of local telephone exchanges by Indian tribes bar their entry into the telecommunications services market, deny them the ability to fulfill an important governmental role, and deprive their members of badly needed services. Thus, the SDPUC’s denial of the sale of the Exchanges to CRSTTA violates Section 253 of the Act by singling out one class of potential competitors, Indian tribes, and preventing them

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services required for Universal Service purposes, as well as 911, Enhanced 911 services, and extended service area calling.

⁶ *New England Public Communications Council*, 11 FCC Rcd 19713 ¶ 9 (1996) (quoting S. CONF. REP. No. 104-230 at 1 (1996)).

⁷ As a group, Indians have an *average* telephone subscribership rate of only 50 percent. See Speech By Reed Hundt, Chairman Federal Communications Commission at the Telecompetition ‘95 Conference, Washington, D.C. (Dec. 5, 1995) (“Our universal service policies are broke and need fixing . . . 50% of rural Native Americans do not have telephone service.”) In many cases, the actual phone penetration levels are even lower.

from becoming service providers in the local exchange market. Such action is in direct conflict with two of the most fundamental mandates of the Telecommunications Act of 1996 -- to foster competition in the provision of local exchange services and to ensure that *all* Americans have access to basic and advanced telecommunications services. Therefore, as discussed below, the Commission should preempt enforcement of the South Dakota law as applied to prevent Indian tribes from purchasing telephone exchanges serving tribal lands.

**I. THE SOUTH DAKOTA LAW AS APPLIED BY THE SDPUC
ERECTS AN IMPERMISSIBLE BARRIER TO ENTRY FOR
ALL TRIBAL ENTITIES SEEKING TO OWN AND OPERATE
TELEPHONE EXCHANGES IN SOUTH DAKOTA**

The Act invalidates state law barriers to local competition. Section 253(a) provides:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.⁸

In the event the Commission determines that a state law constitutes a barrier to entry, the Communications Act requires preemption of such state law:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.⁹

⁸ 47 U.S.C. § 253(a).

⁹ 47 U.S.C. § 253(d).

With this provision of the Act, Congress “intended to pave the way for enhanced competition in all telecommunications markets. by allowing all providers to enter all markets.”¹⁰

A. The SDPUC’s Application of S.D. Codified Laws § 49-31-59 is Inconsistent With Section 253 of the Act

The SDPUC’s application of S.D. Codified Laws § 49-31-59, violates these provisions of the Act. By finding that because it lacks regulatory and taxation authority over Indian-operated telephone companies like CRSTTA the SDPUC cannot approve the sale of an Exchange to an such a company, the SDPUC has effectively barred all Indian tribes from entry into the South Dakota telecommunications market. Because, as a matter of general federal Indian law principles, the State of South Dakota will always lack the requisite regulatory and taxation authority, the SDPUC will never approve the sale of a telephone exchange to an Indian tribe.

The FCC considered and rejected a similar regulatory barrier in *New England Public Communications*.¹¹ In that proceeding, the petitioners sought preemption of a decision of the Connecticut Department of Public Utility Control prohibiting all entities except incumbent local exchange carriers (“LECs”) and certified LECs from providing pay telephone services in the State of Connecticut.¹² The FCC found that the decision violated Section 253 because such a “prohibition on competitive entry against a particular class of potential competitors is inconsistent with the pro-competitive policies of the 1996

¹⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 at ¶ 4 (1996).

¹¹ *New England Public Communications Council Petition for Preemption Pursuant to Section 253*, 11 FCC Rcd 19713 (1996).

¹² *Id.* at 19713.

Act . . .”¹³ As in *New England Public Communications*, the SDPUC’s interpretation of South Dakota law will act as a barrier to entry for an entire class of new telecommunications competitors and is, therefore, inconsistent with Section 253(a).¹⁴ The Commission must preempt enforcement of S.D. Codified Laws § 49-31-59 against Indian tribes under Section 253(d) of the Act.

B. The SDPUC’s Application of South Dakota Law is Not Protected From Preemption Under Section 253(b) of the Act

Section 253(b) of the Communications Act provides that the statute does not affect “the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”¹⁵ The SDPUC’s application of the South Dakota law, however, is not “competitively neutral” nor is it necessary to “preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, [or] safeguard the rights of consumers.” Instead, the statute as

¹³ *Id.* at 19721. See also *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 FCC Rcd 13082, 13095 (1996) (“We conclude that section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality.”)

¹⁴ See also, *In the Matter of The Public Utility Commission of Texas*, 9 CR (P & F) 958 (1997).

¹⁵ 47 U.S.C. § 253(b).

applied by the SDPUC discriminates against Indian tribes and tribal entities seeking to provide telecommunications services in South Dakota.

In *New England Public Communications*, the Commission addressed whether the kind of blanket prohibition at issue was permissible under Section 253(b) of the Act. It determined that such a rule was not competitively neutral because it excluded an entire class of potential competitors from providing telecommunications services.¹⁶ Likewise, the South Dakota statute, as applied, excludes all South Dakota Indian tribes and therefore is not competitively neutral.

Moreover, the Commission, as an alternative basis, found that the prohibition at issue in *New England Public Communications* was not “necessary” to ensure quality of services and to safeguard the rights of the consumers.¹⁷ In its consideration of the CRSTTA sale, the SDPUC held that approval of the sale of the Exchanges was not in the public interest because the SDPUC could not ensure that the Telephone Authority would provide the same kind and quality of services that U S WEST currently provides in those exchanges.¹⁸ The Commission rejected this same argument in *New England Public Communications* and questioned how the certification requirement ensured protection of the public welfare.¹⁹ As in that case, SDPUC has completely failed to offer any explanation as to how or why regulatory authority over CRSTTA is necessary to ensure the public welfare. The CRSTTA has provided high quality telephone services for the past 21 years. The SDPUC has made no allegation or offered any evidence that the tribe would not continue its

¹⁶ *New England Public Communications*, 11 FCC Rcd at 19721-19722.

¹⁷ *Id.* at 19722.

¹⁸ Morristown Decision at 7 (finding of fact 20); McIntosh Decision at 7 (finding of fact 20); Timber Lake Decision at 7 (finding of fact 20).

¹⁹ *See New England Public Communications Council*, 11 FCC Rcd at 19723.

high level of service in the new exchanges. Thus, the SDPUC has not demonstrated that its actions are necessary to protect the welfare of consumers.

Conclusion

It is impossible to overstate the need for and importance of basic and advanced telecommunications to rural tribal communities. As noted by the Office of Technology Assessment,

telecommunications technology offers many opportunities to help Native Americans deepen their cultural roots, empower their communities, strengthen native governments, and address daunting challenges such as very high unemployment and poverty rates and poor health conditions. The promise of telecommunications is by no means assured, however.²⁰

²⁰ Office of Technology Assessment, telecommunications Technology and Native Americans: Opportunities and Challenges 2 (1995).

Given the critical nature of telecommunications to tribal people, it is very important that artificial barriers to the development of advanced telecommunications capabilities are not created. The SDPUC application of South Dakota law represents just such an artificial barrier and must be preempted under Section 253 of the Act.

Dated: February 27, 1998

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'C. W. Murphy', written over the typed name.

Charles W. Murphy, Chairman
Standing Rock Sioux Tribe